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No. 46

Supreme Court of the United States

October Term, 1947

Petitioner,

vs.

Respondent.

On Petition for Writ of Certiorari to the

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 446

PAUL AHRENS, ET AL.

v.

TOM C. CLARK, ATTORNEY GENERAL

MEMORANDUM IN OPPOSITION TO PETITIONERS' APPLICATION FOR A STAY

The respondent's opposition to petitioners' application for a stay rests upon his conviction that the institution of habeas corpus proceedings here involved constitutes an abuse of process. Under such circumstances, it is submitted that Rule 45 (1) of this Court is wholly inapplicable if its purpose and effect is, as petitioners suggest, to make mandatory the issuance of a stay "pending review of a decision refusing a writ of habeas corpus." For if such is the effect of the rule, petitioners can utterly frustrate the executive power of removal by the simple process of continually filing applications for a writ, albeit frivolous, and thus bring Rule 45 (1) into operation.

Petitioners are German alien enemies presently detained at Ellis Island, New York; orders of removal have been issued against them by the Attorney General under Presidential Proclamation 2655, promulgated on July 14, 1945, and the Alien Enemy Act of 1798, 1 Stat. 577, 8 U. S. C. 21. The proceeding herein, in connection with which petitioners' application for a stay order is made, is the most recent in a series of substantially identical litigations instituted by petitioners and their counsel against the Attorney General. All of the petitioners herein, 129 in number,[1] have been parties to one or more of the prior suits. The issues herein have all been determined adversely to petitioners in these prior suits. We respectfully submit that the instant proceeding is entirely frivolous and constitutes a flagrant abuse of the beneficial rule which protects petitions for writs of habeas corpus from the inflexible bar of prior adjudication. Petitioners' objective, as we stated at the outset, is continually to invoke an adjunct of the habeas corpus procedure, the judicial power to issue stay orders, as an end in itself, and to pervert this judicial power into an injunction for the perpetual frustration of the power of the executive branch over alien enemies. Claiming that Rule 45 (1) of the Rules of this Court automatically operates

[1] The petition for a writ of habeas corpus filed in the district court herein listed 139 petitioners. Ten are omitted in the petition for certiorari.

to freeze their custody at Ellis Island, petitioners seek to achieve in a series of losing litigations the very objective which they are unable to attain on the merits of any of their cases.[3]

The present proceeding was instituted by filing a petition for a writ of habeas corpus on July 17, 1947, in the District Court for the District of Columbia. In connection with a motion to dismiss filed on July 21, 1947, the Attorney General pointed out that the petition was substantially identical with the petition for a writ of habeas corpus unsuccessfully prosecuted by petitioners in a prior habeas corpus proceeding, under the caption *Hermann Ague, et al* v. *Tom C. Clark, Attorney General* (Habeas Corpus No. 3132, Dist. Court of D. of C.). The *Ague* habeas corpus proceeding was instituted by petitioners on December 10, 1946, immediately upon the denial by this Court of their petition for certiorari in *Citizens Protective League, et al.* v. *Tom C. Clark, Attorney General,* 155 F. 2d 290 (App. D. C.) certiorari denied, 329 U. S. 787. The district court entered an order dismissing the *Ague* case on the same day, and an appeal taken to the court below was dismissed by order

[3] Since it is our view that Rule 45 (1) is inapplicable to abuse of the habeas corpus procedure, it is unnecessary, in this proceeding, to do more than note the Government's view that Rule 45 (1) applies only to preclude the admission of a prisoner to bail when his habeas corpus application appears to be unmeritorious on its face; a reading of the remainder of Rule 45, dealing with more substantial applications, serves to confirm this construction.

dated February 24, 1947 (No. 9949 in the Court of Appeals for the District of Columbia). After the dismissal of this appeal, petitioners obtained stays of mandate for the full time within which they might have applied for certiorari upon the representation to the court below that they intended to do so. No such application was filed.[3]

Petitioners, to meet the challenge that the petition for a writ of habeas corpus originally filed herein was the same as that unsuccessfully prosecuted in the *Agne* case, filed an amended petition on July 23, 1947.[4] Petitioners contended in the district court and in the court below that their petition as amended raised two "new" issues which serve to distinguish it from the *Agne* case. The first of these alleged differences consisted of a vague allegation that "a considerable number of the petitioners herein are not, in fact, alien enemies * * * in that their citizenship was taken from them without due process of law and

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[3] During this period, on April 3, 1947, petitioners filed in the District Court for the District of Columbia a complaint for a mandatory injunction, to which all of the petitioners herein were or became parties, under the caption *Maria Bertelmann, et al.* v. *Tom C. Clark, Attorney General*, Civil Action No. 1435-47. This proceeding was dismissed by order dated July 21, 1947, and a motion to dismiss the appeal which was taken is presently pending before the court below. No new issues of fact or law were presented by the *Bertelmann* proceeding.

[4] The amendment was permitted on the understanding that the Attorney General's motion to dismiss should apply to the petition as amended.

as a result of war hysteria." This allegation, collaterally attacking denaturalization judgments against a few of the petitioners, was plainly not new, it having been urged in the *Citizens Protective League* cases on behalf of the same parties (see Record in Nos. 586, 587, 588, October Term, 1946, p. 2, pars. 7 and 8; p. 8, pars. 3 and 5; and p. 10, par. 12); it was properly rejected by the Court of Appeals. 155 F. 2d at 292–293.[5] The second "new issue" which was asserted by petitioners consisted of a contention to the effect that the executive power over alien enemies under the Alien Enemy Act of 1798 lapsed with the cessation of hostilities.[6]

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[5] Petitioners seek to avoid the effect of the decision in the *Citizens Protective League* cases on identical allegations advanced herein on the ground that the original proceeding was a suit for injunction. The effect of the *Citizens Protective League* decision cannot validly be thus avoided. On the contrary, a comparison of these cases emphasizes the fact that petitioners' application for a writ of habeas corpus is a relitigation and can at best be characterized, as held by the district court, as a petition for reconsideration. As such it is clearly an improper use of habeas corpus procedure. *Sunal* v. *Large* and *Alexander* v. *United States ex rel. Kulick*, Nos. 535 and 840, October Term, 1946, decided June 23, 1947.

[6] It should be noted that this contention is the ground upon which the present petition for certiorari is prosecuted. Typewritten brief in Support of Petition for Certiorari, pp. 6–18. The petition for certiorari also contains a vague reference to *United States ex rel. Von Heymann* v. *Watkins*, 159 F. 2d 650 (C. C. A. 2), coupled with a statement that "* * * as yet there has been no determination of reasonable time * * *" within which an alien enemy is to depart from the United States. Presumably, petitioners mean that alien enemies should have reasonable time to depart from the United States

This contention had been advanced in one form or another in each of petitioners' prior suits. In the *Citizens Protective League* cases, the Court of Appeals specifically rejected the contention (155 F. 2d at 295), and it was explicitly made in the petition for a writ of certiorari filed in that case, Nos. 586, 587, 588, October Term, 1946. Certiorari denied 329 U. S. 781. The same contention had been alleged in the *Agne* case[4] and the *Bertelmann* case. See note 3, p. 5, supra.[5]

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and that there has been no judicial determination as to what constituted a reasonable time. In this connection, it should be noted that the Court of Appeals in the *Citizens Protective League* cases, with reference to this same group of litigants, recited with approval the provision of the regulations of the Attorney General "for a 30-day notification of the order directing that the [the alien enemy] depart from the United States, and for his release, unless the public safety otherwise requires, for 30 days in order that he may settle his personal and business affairs * * * and make arrangements to depart from the country." 155 F. 2d at 295. If petitioners seek to inject this as an issue, it is a patently frivolous one.

[4] Paragraph 4 of petition for writ of habeas corpus in the *Agne* case reads as follows:

"4. Petitioners say unto the Court that the authority of the chief executive to remove from our shores enemy aliens rests upon the proposition that the country is at war. The country is not now at war and there is no legal basis for deporting these persons."

[5] Paragraph 7 of the complaint in the *Bertelmann* case reads, in pertinent part, as follows:

"7. Plaintiffs say unto the Court that the war powers under which the President of the United States is proceeding have not virtually come to an end and that being so that there is no legal basis for deporting these persons to Germany. Plaintiffs say further that it would be inhumane to deport them to Germany because the plan is to send them to

A hearing was held on the Attorney General's motion to dismiss, and on petitioners' oral application for a stay, on July 23, 1947, and an order dismissing the petition and denying an application for a stay was entered on the same day. Chief Justice Laws held that the petition for a writ of habeas corpus herein was identical with that fully prosecuted in the *Agne* case and that the present proceeding was merely an application for reconsideration of the decision in that case.

Upon petitioners' application for a stay order against the Attorney General in connection with removal proceedings, pending determination of petitioners' appeal to the court, the Court of Appeals held a hearing in chambers before Stephens and Clark, JJ. At that hearing, the court below indicated unwillingness to deny the requested stay in view of the possible automatic application of Rule 45 (1) of the Rules of this Court. While granting the stay, the court suggested that the Government file a motion to dismiss the appeal. The motion was filed and sustained by the court by order dated October 30,

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the Russian zone of occupation, which would mean perpetual servitude and perhaps death. Plaintiffs say further that while peace has not formally been declared, the emergency as such is at an end. Plaintiffs say further that a treaty is now in the making and as soon as same is ratified these persons will no longer be enemy aliens, and furthermore that there is no longer any threat to the peace and security and to the safety of the United States from the hands of the Germans, but the threat to our peace and security arises in another sphere."

1947. The petition for certiorari herein, coupled with the application for a stay order followed.

We believe that Rule 45 (1) is neither automatic nor self-operating. And we strongly urge that there is nothing in the circumstances of this case, as set forth above, to justify a favorable exercise of this Court's discretion to issue a stay order. This Court has recognized the propriety of an exercise of judicial administrative discretion to prevent abuse of the writ itself. *Wong Doo* v. *United States*, 265 U. S. 239; see also *Dorsey* v. *Gill*, 148 F. 2d 857 (App. D. C.), certiorari denied, 325 U. S. 890. In the *Wong Doo* case, a second petition for a writ of habeas corpus had been held by a district court to be subject to the doctrine of *res judicata*. The petitioner was a Chinese in custody under an order of deportation issued under the Immigration Act of February 5, 1917, 39 Stat. 874, and was attempting to delay the deportation by the use of habeas corpus. This Court, after holding that the doctrine of *res judicata* did not apply, stated (265 U. S. at 241):

> It does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition.

> The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ, of *habeas corpus*. No reason for not presenting the proof at the outset is offered. It has not been embodied in the record, but what is said of it there and in the briefs shows that it was accessible all the time. If an alien whose deportation has been ordered can do what was attempted here, it is easy to see that he can postpone the execution of the order indefinitely. Here the execution already has been postponed almost four years.
>
> We conclude that the judgment was right, although a wrong reason was given for it. The delay resulting from the course pursued by the petitioner has been unreasonable; * * *

It is clear that judicial power to protect against abuse of habeas corpus process itself *a fortiori* carries with it the power to prevent misuse of rules appurtenant to habeas corpus proceedings. Such supervision over habeas corpus proceedings and related rules of court is obviously within the realm of judicial administration and discretion. The view of Rule 45 (1), here urged by petitioners, would leave courts free to control

habeas corpus proceedings but powerless to prevent frivolous litigants from attaining their objectives by an automatic application of rules. The situation is sharply pointed up where, as here, the result is a perpetual injunction against the exercise of a plenary power over alien enemies which Congress has entrusted to the executive branch.

A second, and independent, basis for denial of petitioners' application for a stay, lies in the view taken by the District Judge herein, namely, that this proceeding is a mere application for reconsideration of a prior decision against these petitioners. The district court's view finds support in the decision of this Court in *Sunal* v. *Large* and *Alexander* v. *United States ex rel. Kulick*, Nos. 535 and 840, October Term, 1946, decided June 23, 1947. However, we prefer to rest our opposition to petitioners' application for a stay on the ground that the granting or denial of such an order is not automatic but is a matter sufficiently within judicial control so that it cannot be made the subject of continuing abuse.

In this regard, it is important to emphasize that the denial of the petition for certiorari herein in and of itself will not meet or solve the problem. As the past history of these litigations shows, petitioners can confront lower courts with relitigation. In each suit, their contention that a stay automatically issues under the Rules of this Court has been and will be treated with con-

siderable delicacy until this Court takes action on the point. The Court of Appeals in the instant case was reluctant to deny a stay in the absence of a ruling by this Court on a similar application and we may assume that the same reluctance will be displayed by courts in the future. The grant of a stay order herein will strengthen petitioners' contention and will increase the above-described reluctance on the part of the lower courts. The importance of the matter is emphasized by the fact that all but a few of the German alien enemies held on Ellis Island have been and are covered by this series of mass litigations. For these reasons, we strongly urge that the application for a stay be denied.

Respectfully submitted.

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